Saiful Bahari bin Yunus v Dato' Jamil bin Rakon (Setiausaha Suruhanjaya Pasukan Polis) & Ors

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO P-01(A)-203–04 OF 2022
VAZEER ALAM MYDIN, MARIANA YAHYA AND LIM CHONG FONG JJCA
9 MARCH 2023

Police — Disciplinary proceedings — Dismissal — Police officer who was detained and then ordered to undergo restricted residence punishment under Dangerous Drugs (Special Preventive Measures) Act 1985 was dismissed from the Force — Whether High Court rightly dismissed officer's attempt to quash dismissal decision via judicial review application — Whether officer had failed to show decision-making process in the disciplinary action against him was tainted by irrationality, illegality or procedural impropriety

The instant appeal was against the High Court's dismissal of the appellant's judicial review application to challenge his dismissal from the Royal Malaysian Police Force where he rose to become Assistant Superintendent after 14 years in service. The dismissal decision was made by the second respondent in accordance with reg 38(g) of the Public Officers (Conduct and Discipline) Regulations 1993 ('the Regulations') after the appellant was first detained and then ordered to serve out a restricted residence order ('the restriction order') under the Dangerous Drugs (Special Preventive Measures) Act 1985. The appellant challenged the validity of the detention and restriction orders by way of judicial review but failed both before the High Court at first instance and on appeal before the Court of Appeal. His challenge against the dismissal from the force was also dismissed by the High Court which found no procedural impropriety in the manner in which it was done. In his instant appeal against that decision, the appellant contended that: (a) he was denied of the right to appeal against his dismissal pursuant to art 144(5A)(b) read together with art 8 of the Federal Constitution ('the FC'); (b) he was not given the opportunity to be heard or to make a plea in mitigation before the dismissal decision was made; (c) the second respondent's dismissal decision was not supported by any reasoning and was harsh, unjust and unreasonable; (d) his suspension from service ('service suspension order') by the Inspector-General of Police ('IGP') was unlawful because only the Disciplinary Authority was authorised to suspend him under reg 45(1) of the Regulations; and (e) the dismissal decision was bad for being made after the detention order had lapsed.

Held, unanimously dismissing the appeal:

(1) The High Court judge found that art 144(5B) on appeal only specifically applied to the Public Services Commission or the Education Services Commission established under arts 139 and 141A, respectively, of the Federal Constitution ('the FC') and that if no constitutional or statutory right to appeal was provided for, then the proper course was for the appellant to apply for judicial review — and that was exactly what he did in the instant case. Although this court found that there was a right of appeal accorded under art 144(5A) of the FC, that question became academic because the appellant neither sought an appeal against the dismissal decision, nor was denied an appeal after it was sought. Instead, the appellant chose to apply for judicial review of the dismissal decision (see paras 19–20).

(2) The High Court judge correctly found that art 135(2)(d) of the FC took away a person's right to be heard in disciplinary proceedings if, among other things, a restricted residence order had been made against him. The detention and restriction orders against the appellant were imposed pursuant to ss 6(1) to (3) and 7(1) and (2) of the Dangerous Drugs (Special Preventive Measures) Act 1985. Article 135(2)(d) of the FC was therefore attracted and was applicable so long as there was a detention and/or restricted residence order in place. It was neither mandatory nor necessary that those orders must have emanated from a statute relating to the security of the Federation. It was sufficient that the detention and restriction orders were made pursuant to the Dangerous Drugs (Special Preventive Measures) Act 1985 (see paras 23–26).

(3) The High Court judge correctly found that the appellant could not claim a right or opportunity to mitigate since the Disciplinary Authority ('DA') had all the necessary documentation including the appellant's service records and recommendations from his head of department to decide on the appropriate sentence to be meted out to him. The sentence to be imposed was within the sole purview of the DA and the court would only intervene if it was proven that the DA had acted capriciously or in bad faith (see paras 28–30).

(4) The High Court judge found nothing in the Regulations that obligated the Disciplinary Authority to give reasons for its decision. Nonetheless, the appellant knew of the reason for his dismissal when he received written notice of the dismissal decision from the second respondent. It was adequate that the appellant knew that his dismissal was as a result of the detention/restriction orders being issued against him. In any event, there was no need for the appellant to have been given detailed reasons for his dismissal because the judicial review application was not concerned with the merits of the decision itself but with the decision-making process (see paras 33–34).

(5) The IGP's service suspension order against the appellant had no material bearing on the detention and restriction orders or the dismissal decision. The service suspension order was lawfully made by the IGP pursuant to disciplinary powers delegated to him by the second respondent via Instrument of Delegation of Certain Functions, Powers, Duties and Responsibilities (PU(B) 441/2000). There was also no violation of art 149(1) of the FC which would have rendered the dismissal decision a nullity (see paras 5 & 40–41).

(6) It was immaterial if the dismissal decision was made after the detention order had lapsed or expired as art 135(2) of the Federal Constitution did not stipulate that the detention order must have been subsisting at the time of dismissal of the officer (see para 43).

(7) The High Court judge did not commit any misdirection in dismissing the appellant's judicial review application. The appellant had failed to demonstrate any irrationality, illegality or procedural impropriety in the decision-making process in the disciplinary action that was taken against him (see paras 44–45).

[Bahasa Malaysia summary

Rayuan semasa adalah terhadap penolakan Mahkamah Tinggi terhadap permohonan semakan kehakiman perayu untuk mencabar pemecatan beliau daripada Pasukan Polis Diraja Malaysia di mana beliau naik pangkat menjadi Asisten Superintendan selepas 14 tahun dalam perkhidmatan. Keputusan pemecatan tersebut dibuat oleh responden kedua mengikut peraturan 38(g) Peraturan-Peraturan Awam (Kelakuan dan Tatatertib) 1993 ('Peraturan tersebut') selepas perayu mula-mula ditahan dan kemudian diperintahkan untuk melaksanakan perintah sekatan kediaman ('perintah sekatan tersebut') di bawah Akta Dadah Berbahaya (Langkah-Langkah Pencegahan Khas) 1985. Perayu mencabar kesahihan perintah tahanan dan sekatan melalui semakan kehakiman tetapi gagal di hadapan Mahkamah Tinggi pada peringkat pertama dan semasa rayuan di hadapan Mahkamah Rayuan. Cabarannya terhadap pemecatan daripada perkhidmatan juga ditolak oleh Mahkamah Tinggi yang mendapati tiada ketidakwajaran prosedur dalam cara ia dilakukan. Dalam rayuan semasanya terhadap keputusan tersebut, perayu berhujah bahawa: (a) beliau telah dinafikan hak untuk merayu terhadap pemecatan beliau menurut perkara 144(5A)(b) dibaca bersama dengan perkara 8 Perlembagaan Persekutuan ('PP'); (b) beliau tidak diberi peluang untuk didengar atau membuat rayuan dalam mitigasi sebelum keputusan pemecatan dibuat; (c) keputusan pemecatan responden kedua tidak disokong oleh sebarang alasan dan adalah teruk, tidak adil dan tidak munasabah; (d) penggantungannya daripada perkhidmatan ('perintah penggantungan perkhidmatan') oleh Ketua Polis Negara ('KPN') adalah menyalahi undang-undang kerana hanya Lembaga Tatatertib diberi kuasa untuk menggantungnya di bawah peraturan 45(1) Peraturan tersebut; dan (e) keputusan pemecatan adalah buruk kerana

dibuat selepas perintah tahanan telah luput. A

Diputuskan, sebulat suara menolak rayuan:

(1) Hakim Mahkamah Tinggi mendapati bahawa perkara 144(5B) mengenai rayuan hanya terpakai secara khusus kepada Suruhanjaya Perkhidmatan Awam atau Suruhanjaya Perkhidmatan Pendidikan yang ditubuhkan di bawah perkara 139 dan 141A, masing-masing, Perlembagaan Persekutuan ('PP') dan jika tiada hak perlembagaan atau undang-undang untuk merayu diperuntukkan, maka jalan yang sepatutnya adalah untuk perayu memohon untuk semakan kehakiman — dan itulah yang dilakukannya dalam kes semasa. Walaupun mahkamah ini mendapati bahawa terdapat hak rayuan yang diberikan di bawah perkara 144(5A) PP, persoalan tersebit menjadi akademik kerana perayu tidak memohon rayuan terhadap keputusan pemecatan, mahupun rayuan ditolak selepas ia diminta. Sebaliknya, perayu memilih untuk memohon semakan kehakiman terhadap keputusan pemecatan (lihat perenggan 19–20). B C D

(2) Hakim Mahkamah Tinggi dengan betul mendapati bahawa perkara 135(2)(d) PP telah menghilangkan hak seseorang untuk didengar dalam prosiding tatatertib jika, antara lain, perintah sekatan kediaman telah dibuat terhadapnya. Perintah penahanan dan sekatan terhadap perayu telah dikenakan menurut ss 6(1) hingga (3) dan 7(1) dan (2) Akta Dadah Berbahaya (Langkah-Langkah Pencegahan Khas) 1985. Oleh itu, perkara 135(2)(d) PP telah tertarik dan terpakai selagi terdapat penahanan dan/atau perintah kediaman terhad. Perintah-perintah tersebut tidaklah wajib dan tidak semestinya berpunca daripada statut yang berkaitan dengan keselamatan Persekutuan. Ia adalah memadai bahawa perintah penahanan dan sekatan dibuat menurut Akta Dadah Berbahaya (Langkah-Langkah Pencegahan Khas) 1985 (lihat perenggan 23–26). E F G

(3) Hakim Mahkamah Tinggi dengan betul mendapati bahawa perayu tidak boleh menuntut hak atau peluang untuk mengurangkan kerana Lembaga Tatatertib ('DA') mempunyai semua dokumentasi yang diperlukan termasuk rekod perkhidmatan perayu dan syor daripada ketua jabatannya untuk membuat keputusan mengenai hukuman yang sesuai untuk dijatuhkan kepadanya. Hukuman yang akan dijatuhkan adalah dalam bidang kuasa tunggal DA dan mahkamah hanya akan campur tangan jika terbukti bahawa DA telah bertindak secara berubah-ubah atau dengan niat jahat (lihat perenggan 28–30). H I

(4) Hakim Mahkamah Tinggi mendapati tiada apa-apa dalam Peraturan yang mewajibkan Lembaga Tatatertib memberikan alasan bagi keputusannya. Namun begitu, perayu mengetahui sebab pemecatannya apabila beliau menerima notis bertulis keputusan pemecatan daripada

responden kedua. Ia adalah memadai bahawa perayu mengetahui bahawa pemecatannya adalah akibat daripada perintah penahanan/sekatan yang dikeluarkan terhadapnya. Dalam apa jua keadaan, perayu tidak perlu diberi alasan terperinci untuk pemecatannya kerana permohonan semakan kehakiman tidak mementingkan merit keputusan tersebut sendiri tetapi dengan proses membuat keputusan (lihat perenggan 33–34).

(5) Perintah penggantungan perkhidmatan KPN terhadap perayu tidak mempunyai kaitan yang penting dengan perintah penahanan dan sekatan atau keputusan pemecatan. Perintah penggantungan perkhidmatan dibuat secara sah oleh KPN menurut kuasa tatatertib yang diwakilkan kepadanya oleh responden kedua melalui Instrumen Perwakilan Fungsi, Kuasa, Tugas dan Tanggungjawab Tertentu (PU(B) 441/2000). Tiada juga pelanggaran perkara 149(1) PP yang akan menyebabkan keputusan pemecatan tersebut terbatal (lihat perenggan 5 & 40–41).

(6) Ia adalah tidak material jika keputusan pemecatan tersebut dibuat selepas perintah tahanan luput atau tamat kerana perkara 135(2) Perlembagaan Persekutuan tidak menetapkan bahawa perintah tahanan mestilah wujud pada masa pemecatan pegawai tersebut (lihat perenggan 43).

(7) Hakim Mahkamah Tinggi tidak melakukan sebarang salah arah dalam menolak permohonan semakan kehakiman perayu. Perayu telah gagal untuk menunjukkan sebarang ketidakrasionalan, penyalahan undang-undang atau ketidakwajaran prosedur dalam proses membuat keputusan dalam tindakan tatatertib yang telah diambil terhadapnya (lihat perenggan 44–45).]

Cases referred to

Asia Commercial Finance (M) Sdn Bhd v Kawal Teliti Sdn Bhd [1995] 3 MLJ 189, SC (refd)

Badiaddin bin Mohd Mahidin & Anor v Arab Malaysian Finance Bhd [1998] 1 MLJ 393, FC (refd)

Inspector-General of Police & Anor v Alan Noor bin Kamat [1988] 1 MLJ 260, SC (distd)

Kerajaan Malaysia & Ors v Tay Chai Huat [2012] 3 MLJ 149; [2012] 3 CLJ 577, FC (folld)

Kesatuan Pekerja-Pekerja Bukan Eksekutif Maybank Bhd v Kesatuan Kebangsaan Pekerja-Pekerja Bank & Anor [2018] 2 MLJ 590; [2017] 4 MLRA 298, FC (folld)

Lembaga Tatatertib Perkhidmatan Awam Hospital Besar Pulau Pinang & Anor v Utra Badi a/l K Perumal [2001] 2 MLJ 417; [2001] 2 CLJ 525, FC (refd)

Ng Hock Cheng v Pengarah Am Penjara & Ors [1998] 1 MLJ 153; [1998] 1 CLJ 405, CA (refd)

Nordin Hj Zakaria (Timbalan Ketua Polis Kelantan) & Anor v Mohd Noor Abdullah [2004] MLJU 760; [2004] 2 CLJ 777, FC (refd)
Pengerusi Lembaga Tatatertib Polis Diraja Malaysia, Bukit Aman, Kuala Lumpur & 2 Ors v Mohd Azuan bin Aniffa (Civil Appeal No 01(f)-57–11 of 2015(W)) (unreported), FC (folld)
Raj Kishore Jha v State of Bihar & Anor [2003]11 SCC 519, SC (folld)
Selvaraju Ponniah v Suruhanjaya Perkhidmatan Awam Malaysia & Anor [2007] 7 MLJ 1; [2007] 6 CLJ 245, FC (refd)
Shuib bin Abdul Samad @ Zainal v Tan Sri Dato Seri Khalid bin Abu Bakar & Ors [2017] 4 MLJ 476; [2017] 10 CLJ 89, CA (refd)
State of Uttar Pradesh v Harish Chandra Singh [1969] 1 SCC 403, SC (refd)
Union of India v Mohd Ramzan Khan [1991] 1 SCC 588, SC (refd)
Vijayarao a/l Sepermaniam v Suruhanjaya Perkhidmatan Awam Malaysia [2018] 12 MLJ 17; [2018] 9 CLJ 141, FC (refd)

Legislation referred to

Dangerous Drugs (Special Preventive Measures) Act 1985 s 6(1), (2), (3), 7(1), (2)
Federal Constitution art 8, 132, 135, 135(2), (2)(d), 139, 141A, 144, 144(5A), (5B), 149, 149(1)
Public Officers (Conduct and Discipline) Regulations 1993 regs 32, 32(1), 33, 38(g), 45(1)

Apeal from: *Saiful Bahari bin Yunus v Dato' Jamil bin Rakon (Setiausaha Suruhanjaya Pasukan Polis) & Ors* [2022] MLJU 786 (High Court, Penang)

M Athimulan (with Tinoshiny Arumugam) (Athimulan & Co) for the appellant.
Nurul Atiqah Azizan (Penang State Legal Advisor's Office) for the respondents.

Lim Chong Fong JCA:

INTRODUCTION

[1] This is an appeal against the High Court's dismissal of judicial review brought by the appellant on his dismissal from the Royal Malaysian Police Force ('PDRM').

[2] On 7 March 2023, we unanimously dismissed the appeal with no order as to costs.

BACKGROUND

[3] The appellant joined the PDRM (Personnel No G/17111) in 2006 and held the last rank of Assistant Superintendent of Police.

A **[4]** On 28 January 2017, the appellant was detained under s 6(1) of the Dangerous Drugs (Special Preventive Measures) Act 1985 ('the DD(SPM)A'). He thereafter on 28 March 2017 received a detention order for detention of two years at the Simpang Renggam Moral Rehabilitation Centre in Johore issued pursuant to the DD(SPM)A commencing from 28th March 2017 ('detention order').

[5] The Inspector General of Police then on 25th April 2017 in the exercise of disciplinary powers delegated by the Police Force Commission via Instrument of Delegation of Certain Functions, Powers, Duties and Responsibilities (PU(B) 441/2000) issued a suspension of service order effective 28 March 2017 ('service suspension order') to the appellant.

[6] On 13 July 2017, the appellant received a suspension of detention order also issued pursuant to the DD(SPM)A which resulted in the stay of the service suspension order and a further order requiring the appellant to undergo restricted residence in Mukim Tebrau, Johore issued pursuant to s 7(1) the DD(SPM)A ('restriction order').

[7] The appellant challenged the detention order and restriction order via separate judicial review proceedings on 28 August 2017 as per High Court of Kuala Lumpur Judicial Review Application No WA-25–212–08 of 2017 but failed. Aggrieved by the said decision, the appellant filed an appeal to this court vide Civil Appeal No W-01(A)-177–03 of 2018, but the appeal was dismissed on 5 August 2018.

[8] Subsequently, the Police Force Commission, ie the second respondent on 30 January 2020 decided that the appellant be imposed with punishment of dismissal in accordance with reg 38(g) of the Public Officers (Conduct and Discipline) Regulations 1993 ('the Regulations') based on the detention order/restriction order ('decision'). The dismissal of the appellant was conveyed to the appellant via a letter dated 10 February 2020 signed by Dato' Jamil bin Rakon, ie the first respondent in his capacity as secretary of the second respondent.

[9] As a result, the appellant on 27 August 2020 commenced judicial review to quash the dismissal decision in the Penang High Court.

IN THE HIGH COURT

[10] The appellant contended that the decision-making process of the second respondent's dismissal decision was tainted with procedural impropriety because he was neither informed of the grounds of the intended disciplinary action nor accorded reasonable opportunity to be heard. In

addition, he was denied the right to mitigate that resulted in a disproportionate sentence imposed on him. He was also denied the right to appeal against the dismissal decision that was made without reasons given for his dismissal. Finally, the appellant contended that the dismissal decision is ultra vires.

[11] The respondents in rebuttal primarily counter-contended that the dismissal decision was properly and correctly made as well as enforced following the due process of law.

[12] The learned High Court judge found that the disciplinary action that led to the dismissal decision was done in accordance with the law. He concluded that procedural and substantive fairness have been accorded to the appellant and that there has been no breach of natural justice whatsoever. Consequently, he found no merits in the judicial review application and dismissed the same with costs of RM2,000 (subject to allocatur) to the respondents.

FINDINGS OF THIS COURT

[13] Before us, the parties primarily reiterated their respective arguments in the High Court below and we have, in the exercise of our appellate function, reviewed the judgment of the learned High Court judge accordingly.

[14] The law on judicial review of dismissal of public servants or officers generally are encapsulated in the Federal Court cases of *Ng Hock Cheng v Pengarah Am Penjara & Ors* [1998] 1 MLJ 153; [1998] 1 CLJ 405 and *Kerajaan Malaysia & Ors v Tay Chai Huat* [2012] 3 MLJ 149; [2012] 3 CLJ 577.

[15] In *Ng Hock Cheng v Pengarah Am Penjara & Ors*, Peh Swee Chin FCJ held as follows:

> After the High Court had judicially reviewed and upheld the disciplinary authority's finding of misconduct or breach of any provision of the code of conduct under the said General Orders, in regard to any further and consequential order of punishment or penalty as prescribed by the 'General Orders' aforesaid and imposed on the public officer in question, the High Court was right in not judicially reviewing such consequential order of dismissal or otherwise interfering with such order. The Court of Appeal was also right for not interfering with the same for reasons which we will discuss as follows.
>
> *A public officer is entitled to impugn any allegation or accusation of any disciplinary breach against him by way of judicial review on the protection given by Federal Constitution, art 135 providing that no member of such service shall be dismissed or reduced in rank except (a) only by an authority that appointed him in the first place; and (b) after being given a reasonable opportunity of being heard. He is, in addition, entitled*

A *to protection from sufficient compliance with the rules of natural justice and the disciplinary procedure provided therefore, see Mohd Bin Ahmad v Yang Di Pertua Majlis Daerah Jempol, Negeri Sembilan & Anor* [1997] 2 MLJ 361; [1997] 3 CLJ 135. *If the public officer succeeds in so impugning, any order of punishment including an order of dismissal can be declared invalid or void, and such order being so declared void,* B *is deemed not to have been made at all or is deemed to have been only purportedly made previously. But if the public officer fails to so impugn, any order of punishment remains and there should be no further review on such order of punishment.*

To so further review judicially would be acting against the concept, in the case of an order of dismissal, that there should not generally be any employment against the will of C *employer or employee*. After all is said and done, persons in the public service categorised under Federal Constitution, art 132 are in fact employees.

Then again there is the elementary principle that a court will not normally decree a specific performance of a contract of personal service or its terms thereof. After a court intervenes by judicial review the question of the alleged disciplinary breach, D the court should thereafter give due respect to this principle on the question of penalty.

The intervention of the said art 135 and the rules of natural justice etc. in the case of a public officer is only one of two exceptions to this elementary principle. Please see Mohd Ahmad. It must be borne in mind that when a court declares as void an order of dismissal E *against a public officer categorised under Federal Constitution, art 132 (see Mohd Ahmad), it does so because the accusation against him on which such an order of dismissal is based, has been found to be invalidly made or conducted, so that the order of dismissal, and for that matter, any other order of penalty is thereby anon sequitur. The court in truth is not substituting the order of dismissal with its own measure of* F *punishment and if in the latter case, it would amount to the court forcing the employer/government to still employ him, or specifically enforcing a contract of personal service*.

It cannot be denied further that the disciplining of a public officer by his department head, is part of the function of the executive branch of the government and any usurpation by a court will be viewed with something very much more than G disfavour even though the judiciary is the judicial branch of the government as well as an institution which belongs to the people. *To repeat, a court intervenes only on the nature and manner of accusation against a public officer as distinct from a consequential punishment as explained above*. (Emphasis added.)

H **[16]** In *Kerajaan Malaysia & Ors v Tay Chai Huat*, Mohd Ghazali Yusoff FCJ held as follows:

[25] In *Utra Badi* this court held that the right to be heard given by art 135(2) of the Federal Constitution does not require that the member of the service facing the I disciplinary charge be given an oral hearing and it could not be argued that the failure to give that person an oral hearing was a denial of justice.

[26] In *Vickneswary*, this court held as follows:

(a) from the provisions of the General Orders it is clear that it is never the intention of the legislators that the courts should step into the shoes of the

disciplinary authority in deciding whether it was fair to the respondent, ie, the member of service facing the disciplinary charge to have granted him a right to make oral representations or whether he should be given such right although he did not ask for it;

(b) it is clear from the facts that the respondent was given an opportunity to be heard whereby he had given a lengthy written representation explaining in detail his innocence; and

(c) it is not the court, but the disciplinary authority which has to decide the question of whether the respondent had exculpated himself by his written representation.

[27] I dare say that the law is settled in cases of this genre. This can be gleaned from several decisions which were decided prior to *Utra Badi* and Vickneswary; see *Hajjah Halimatussaadiah binti Haji Kamaruddin v Public Services Commission, Malaysia & Anor* [1994] 3 MLJ 61; [1994] 3 CLJ 532, *Ghazi bin Mohd Sawi v Mohd Haniff bin Omar, Ketua Polis Negara, Malaysia & Anor* [1994] 2 MLJ 114; [1994] 2 CLJ 333, *Zainal Hashim v Government of Malaysia* [1979] 2 MLJ 276; [1979] 1 LNS 132 *and Najar Singh v Government of Malaysia & Anor* [1974] 1 MLJ 138; [1974] 1 LNS 101.

[28] *From the authorities referred to above, I am of the view that the law is settled. Thus, an oral hearing may be given in instances where the disciplinary authority considers that the case against the officer requires further clarification and consequently appoint a Committee of Inquiry pursuant to GO 26(5) of the GO (Chapter D). If the disciplinary authority considers that no further clarification is required, I do not think that the officer concerned can insist or demand that a Committee of Inquiry be appointed*.

[29] We are a country governed by the rule of law and thus finality of the judgment is absolutely imperative and great sanctity is attached to the finality of the judgment. *In the normal course, it is the disciplinary authority which is the best judge as to whether the person should be dismissed. In that context, the court can only exercise its powers of interference in a limited number of cases where it is shown that the decision to suspend is arbitrary and/or a mala fide exercise of power and/or colourable exercise of power. These are the parameters on which a disciplinary authority must consider when exercising its powers under the GO (Chapter D). It is not for the courts to interfere with exercise of discretion by the disciplinary authority otherwise than in the circumstances set out*.

[30] The use of authorities, or decided cases, is the establishment of some principle which a judge can follow in deciding the case before him. In the instant appeal, several authorities relating to the GO (Chapter D) were referred to as to what was intended and what it expressly provides. My question is what right have the courts to cut down the express power so given to the disciplinary authority by the General Orders? *Utra Badi* and *Vickneswary* are cases which established the principles of law vis a vis the General Orders. Are we entitled to disregard a previous decision of this court laying down a substantive rule of law? *There is no doubt, in my view, that the ratio decidendi of the decision of this court in Utra Badi is that the right to be heard given by art 135(2) of the Federal Constitution does not require that the person concerned be given an oral hearing and that a decision by a disciplinary authority not to give the person concerned an oral hearing after he has submitted a written representation is not*

a denial of justice. There is also no doubt, in my view, that the ratio decidendi of the decision of this court in *Vickneswary* would be as follows:

(a) under the provisions of the General Orders, the courts should not step into the shoes of the disciplinary authority in deciding whether it was fair to the person concerned, after he has made a written representation, to have granted him a right to make oral representation or whether he should be given such right although he did not ask for it; and

(b) *it is not the court but the disciplinary authority which has to decide the question of whether the person concerned has exculpated himself by his written representation*.

[31] From my reading of the judgments in *Utra Badi* and *Vickneswary* which reflected the reasons for the respective decisions, they leave no doubt as to the ratio of the respective decisions of this court. We must not accept the conclusions in these cases as mere dictum but as the ratio decidendi of the cases. *Utra Badi* and *Vickneswary* were former deliberate and explicit decisions of this court upon questions of law.

...

[33] An initiation of disciplinary proceedings against an officer in the public service shall be based upon the code of conduct laid down in GO 26 of the GO (Chapter D). Disciplinary action is clearly a process for dealing with job-related behaviour that does not meet the code of conduct of officers in the public service. A departmental disciplinary action is concerned not with criminal offence but with misconduct. Departmental authorities have no power to punish an employee on a criminal charge, although such authorities may penalise an employee for his misconduct on identical facts. On the facts of the instant appeal, the defendants were basically doing that, ie, the five disciplinary offences were in relation to misconduct involving corrupt practices. It must also be remembered that the proceedings before the disciplinary authority were not criminal proceedings.

[34] The right to punish a citizen for crime is vested in the state whereas the right to penalise an employee for misconduct is in the employer because of the existence of relationship of master and servant and also because the General Orders so provide where public employees are concerned. Thus, an initiation of disciplinary proceedings against an officer in the public service shall be based upon the code of conduct laid down in GO 26 of the GO (Chapter D).

[35] I would think that the attitude of this court towards its previous decisions such as *Utra Badi* and *Vickneswary* upon questions of law should, in my opinion be the same. It is of supreme importance that people may know with certainty what the law is, and this end can only be attained by a loyal adherence to the doctrine of stare decisis. Little respect will be paid to our judgments if we overthrow that one day which we have resolved the day before. 'We cannot say that the law was one thing yesterday but is to be something different tomorrow', per Lord Reid in *West Midland Baptist (Trust) Association Inc v Birmingham Corporation* [1970] AC 874. The instant appeal is no doubt an important case. Disciplinary authorities will be confused if we are to usurp their powers by telling them you should order an oral hearing in one case while in another you need not. They are the ones entrusted by

the General Orders to make that decision and it is not for the court to usurp that function.

[36] *The courts have very limited review powers over administrative determinations of public bodies and are constrained to confirm the findings in disciplinary hearings. The courts will only intervene in disciplinary cases where there was a fundamental procedural flaw. The courts cannot exceed its role in cases of this genre as the instant appeal. The courts cannot interfere merely because it may come to different conclusions on facts on the same basis of the same evidence. Weighing and assessing the evidence is the function of the disciplinary authority which is the body to which the legislature has entrusted the responsibility of deciding the issue, and not the courts. Hence, the court should approach cases of this genre as the instant appeal in the following way, namely, whether there has been an error in the process or whether there was procedural irregularity in the decision-making proceedings leading to the public officer's dismissal.*

[37] A disciplinary authority should not be burdened with the technicalities regarding standard of proof, the rules of evidence and procedure that are applied in a court of law. Following *Utra Badi* and *Vickneswary*, I am of the view that in the instant appeal, the disciplinary authority did observe the rules of natural justice and did give the plaintiff an opportunity to be heard. According to *Osborn's Concise Law Dictionary* (7th Ed), the words 'natural justice' mean 'the rules and procedure to be followed by any person or body charged with the duty of adjudicating upon disputes between, or the rights of other, eg, a government department'. An opportunity to be heard simply means an opportunity to present one's side of the story. The result cannot be faulted or characterised as bad or defective when the proceedings were properly and regularly conducted. The plaintiff in the instant appeal was informed of the charges against him and was given ample opportunity of denying or explaining the alleged misconduct. He in fact did give his written representation dated 19 October 1993 to the Inspector-General of Police (the third defendant).

[38] In the instant appeal, the plaintiff sought a declaration that his dismissal is unlawful, null and void and of no effect. In cases of this genre, the court reviews the lawfulness of a decision or action made by the disciplinary authority which is a public body. Such action is tantamount to a challenge to the way in which the decision has been made by the public body rather than the rights and wrongs of the conclusion reached. *The court is not really concerned with the conclusions of that process and whether the conclusions were 'right', as long as the right procedures have been followed* . In *Ng Hock Seng v Pengarah Am Penjara & Ors* [1998] 1 MLJ 153; [1998] 1 CLJ 405, in delivering the judgment of this court, Peh Swee Chin FCJ said (at p 159):

> *Just like a professional body being the best tribunal to judge the seriousness of misconduct of its members, in a similar vein, an employer, including a government, is the best person to judge similarly the seriousness of misconduct of an employee.*

[39] Thus, a court should not substitute what its thinks is the 'correct' decision. What the court is concerned with is not the decision but the decision-making process. It does not entail the court substituting its discretion for that of the decision maker. 'Unless that restriction on the power of the court is observed, the court will in my view, under the guise of preventing the abuse of power, be itself guilty of usurping power', per Lord Brightman in *Chief Constable of the North Wales Police*

Force v Evans [1982] 1 WLR 1155 at p 1173.

[40] *The courts should not assume the role of primary decision-taker by acting to regulate procedures found in the General Orders because this is not its constitutional function. Chapter D of the General Orders reinforces internal discipline and accountability for wrongdoings and poor performance and helps ensure that public officers will comply with their obligations. Public officers are held accountable for their actions and omissions when these represent a violation of the duties or obligations imposed on them by legislation. The rationale is that an offence committed by a public officer in the course of carrying out his duties negatively affects the public's trust in the administration, which is a public interest given special protection by both the criminal and administrative legal orders. Public officers are expected to make decisions and act solely in the public interest, without consideration of their private interests. Public employment being a public trust, the improper use of a public service position for private advantage is regarded as a serious breach of duty*. (Emphasis added.)

Denial of right to appeal

[17] In respect of the appellant's first contention that the learned High Court judge erred in having failed to consider that the appellant's dismissal decision is tainted with impropriety because he was deprived of his constitutional right to appeal against his dismissal as envisaged under art 144(5A)(b) read together with art 8 of the Federal Constitution.

[18] It is provided in arts 8 and 144 of the Federal Constitution respectively as follows:

Article 8 Equality

(1) All persons are equal before the law and entitled to the equal protection of the law.

(2) Except as expressly authorized by this Constitution, there shall be no discrimination against citizens on the ground only of religion, race, descent, place of birth or gender in any law or in the appointment to any office or employment under a public authority or in the administration of any law relating to the acquisition, holding or disposition of property or the establishing or carrying on of any trade, business, profession, vocation or employment.

(3) There shall be no discrimination in favour of any person on the ground that he is a subject of the Ruler of any State.

(4) No public authority shall discriminate against any person on the ground that he is resident or carrying on business in any part of the Federation outside the jurisdiction of the authority.

(5) This Article does not invalidate or prohibit —

(a) any provision regulating personal law;

(b) any provision or practice restricting office or employment connected with the affairs of any religion, or of an institution managed by a group professing any religion, to persons professing that religion;

(c) any provision for the protection, well-being or advancement of the aboriginal peoples of the Malay Peninsula (including the reservation of land) or the reservation to aborigines of a reasonable proportion of suitable positions in the public service;

(d) any provision prescribing residence in a State or part of a State as a qualification for election or appointment to any authority having jurisdiction only in that State or part, or for voting in such an election;

(e) any provision of a Constitution of a State, being or corresponding to a provision in force immediately before Merdeka Day;

(f) any provision restricting enlistment in the Malay Regiment to Malays.

Article 144 Functions of the Service Commission

(1) Subject to the provisions of any existing law and to the provisions of this Constitution, it shall be the duty of a Commission to which this Part applies to appoint, confirm, emplace on the permanent or pensionable establishment, promote, transfer and exercise disciplinary control over members of the service or services to which its jurisdiction extends.

(2) Federal law may provide for the exercise of other functions by any such Commission.

(3) The Yang di-Pertuan Agong may designate as special posts any post held by the head or deputy head of a department or by an officer who in his opinion is of similar status; and the appointment to any post so designated shall not be made in accordance with Clause (1) but shall be made by the Yang di-Pertuan Agong on the recommendation of the Commission whose jurisdiction extends to the service in which the post is held.

(4) The Ruler or Yang di-Pertua Negeri of a State may designate as special posts any posts in the public service of his State held by the head or deputy head of a department or by an officer who in his opinion is of similar status; and the appointment to any post so designated shall not be made in accordance with Clause (1) but shall be made by the Ruler or Yang di-Pertua Negeri on the recommendation of the Public Services Commission (or, if there is in the State a State Public Service Commission, on the recommendation of that Commission).

(5) Before acting, in accordance with Clause (3) or (4), on the recommendation of the Commission therein mentioned —

(a) the Yang di-Pertuan Agong shall consider the advice of the Prime Minister; and

(b) the Ruler or Yang di-Pertua Negeri shall consider the advice of the Chief Minister of his State,

and may once refer the recommendation back to the Commission in order that it may be reconsidered.

(5A) Save as provided in Clause (5B), federal law and, subject to the provisions of any such law, regulations made by the Yang di-Pertuan Agong may, notwithstanding the provisions of Clause (1) of Article 135, provide for the exercise by any officer in a service to which the jurisdiction of a Commission to which this Part applies extends, or by any board of such officers, of any of the functions of the Commission under Clause (1):

Provided that —

(a) no such law or regulation may provide for the exercise by any such officer or board of officers of any power of first appointment to the permanent or pensionable establishment, or of any power of promotion (other than promotion to an acting appointment); and

(b) any person aggrieved by the exercise by any such officer or board of officers of any power of disciplinary control may appeal to the Commission within such time and in such manner as may be prescribed by any such law or regulations, and the Commission may make such order thereon as it may consider just.

(5B) (i) Notwithstanding the provisions of Clause (1) of Article 135 and Article 139 and Article 141A, all the powers and functions of the Public Services Commission or the Education Service Commission established under Article 139 and Article 141A, other than the power of first appointment to the permanent or pensionable establishment, may be exercised by a board appointed by the Yang di-Pertuan Agong.

(ii) Any person aggrieved by the exercise by the board of any of the aforesaid powers or functions may appeal to an Appeal Board appointed by the Yang di-Pertuan Agong.

(iii) The Yang di-Pertuan Agong may by regulations provide for matters relating to the appointments of the members of, and the procedure to be followed by, the board or the Appeal Board under this Clause.

(iv) Where the Yang di-Pertuan Agong has appointed the board under paragraph (i) of this Clause for the purpose of exercising any of the powers or functions referred to under that paragraph, such power or function shall so long as it remains a power or function to be exercised by the board, cease to be exercisable by the said Commission.

(6) A Commission to which this Part applies may delegate to any officer in a service to which its jurisdiction extends, or to any board of such officers appointed by it, any of its functions under Clause (1) in respect of any grade of service, and that officer or board shall exercise those functions under the direction and the control of the Commission.

(6A) In respect of members of the general public service of the Federation who are employed in posts ancillary to the armed forces or any of them or to the police force, or in respect of any grade of members of that service who are so employed, functions of the Publicvmx. Services Commission may, under Clause (5A) or (6), be made

exercisable by an officer or board of officers of the armed forces or police force, as the case may be, as if he or they were members of the general public service of the Federation. A

(7) In this Article 'transfer' does not include transfer without change of rank within a department of Government.

(8) A Commission to which this Part applies may, subject to the provisions of this Constitution and of federal law, make rules regulating its procedure and specifying the number of its members which are to constitute a quorum. B

[19] The learned High Court judge found that art 144(5B) on appeal only specifically applies to the Public Services Commission or Education Services Commission established under art 139 and art 141A of the Federal Constitution respectively. Furthermore, the learned High Court judge held following the Federal Court case of *Vijayarao a/l Sepermaniam v Suruhanjaya Perkhidmatan Awam Malaysia* [2018] 12 MLJ 17; [2018] 9 CLJ 141 that the proper recourse for the appellant is to apply for judicial review where there is no constitutional or statutory right to appeal. This has been done here. C D

[20] Upon our review of the learned High Court judge's decision and albeit we find that there is a right of appeal accorded by virtue of art 144(5A) of the Federal Constitution, we however find this is academic because the appellant neither sought an appeal against the dismissal decision nor was denied an appeal after it was sought. The appellant instead chose judicial review of the dismissal decision. E F

Deprivation of opportunity to be heard

[21] Next the appellant contended that the learned High Court judge erred in having failed to take into consideration that the respondents wrongfully invoked art 135(2)(d) of the Federal Constitution in depriving the appellant of his opportunity to be heard when the restriction order made against him was done to maintain public order under the DD(SPM)A but not under any law relating to security of the Federation or prevention of crime G H

[22] It is provided as follows in art 135 of the Federal Constitution and regs 32 and 33 of the Regulations which are made pursuant to art 132 of the Federal Constitution respectively:

Article 135 Restriction on dismissal and reduction in rank I

(1) No member of any of the services mentioned in paragraphs (b) to (h) of Clause (1) of Article 132 shall be dismissed or reduced in rank by an authority subordinate to that which, at the time of the dismissal or reduction, has power to appoint a member of that service of equal rank:

Provided that in its application to members of the services mentioned in paragraph (g) of Clause (1) of Article 132 this Clause shall not apply to any law which the legislature of any State, other than Penang and Malacca, may make to provide that all powers and functions of a Public Service Commission of such State, other than the power of first appointment to the permanent or pensionable establishment, be exercised by a Board appointed by the Ruler of such State:

And provided further that this Clause shall not apply to a case where a member of any of the services mentioned in this Clause is dismissed or reduced in rank by an authority in pursuance of a power delegated to it by a Commission to which this Part applies, and this proviso shall be deemed to have been an integral part of this Clause as from Merdeka Day.

(2) No member of such a service as aforesaid shall be dismissed or reduced in rank without being given a reasonable opportunity of being heard:

Provided that this clause shall not apply to the following cases:

(a) where a member of such a service is dismissed or reduced in rank on the ground of conduct in respect of which a criminal charge has been proved against him; or

(b) where the authority empowered to dismiss or reduce in rank a member of such a service is satisfied that for some reason, to be recorded by that authority in writing, it is not reasonably practicable to carry out the requirements of this Clause; or

(c) where the Yang di-Pertuan Agong, or, in the case of a member of the public service of a State, the Ruler or Yang di-Pertua Negeri of that State, is satisfied that in the interests of the security of the Federation or any part thereof it is not expedient to carry out the requirements of this Clause; or

(d) where there has been made against a member of such a service any order of detention, supervision, restricted residence, banishment or deportation, or where there has been imposed on such a member any form of restriction or supervision by bond or otherwise, under any law relating to the security of the Federation or any part thereof, prevention of crime, preventive detention, restricted residence, banishment, immigration, or protection of women and girls:

Provided further that for the purpose of this Article, where the service of a member of such a service is terminated in the public interest under any law for the time being in force or under any regulation made by the Yang di-Pertuan Agong under Clause (2) of Article 132, such termination of service shall not constitute dismissal whether or not the decision to terminate the service is connected with the misconduct of or unsatisfactory performance of duty by such member in relation to his office or the consequences of the termination involved an element of punishment; and this proviso shall be deemed to have been an integral part of this Article as from Merdeka Day.

(3) No member of any of the services mentioned in paragraph (c), (f) or (g) of

Clause (1) of Article 132 shall, without the concurrence of the Judicial and Legal Service Commission, be dismissed or reduced in rank or suffer any other disciplinary measure for anything done or omitted by him in the exercise of a judicialfunction conferred on him by law.

Regulation 32 Procedure where there is an order of detention, banishment, etc.

(1) Where —

(a) an order of detention other than an order of remand pending trial or for purposes of investigation;

(b) an order of supervision, restricted residence, banishment or deportation; or

(c) an order which imposes any form of restriction or supervision, whether with bond or otherwise,

has been made against an officer under any law relating to the security of Malaysia or any part of Malaysia, the prevention of crime, preventive detention, restricted residence, banishment, immigration, or the protection of women and girls or of children, the officer's Head of Department shall apply for a copy of the order from the appropriate authority.

(2) Upon receipt of a copy of the order referred to in sub-regulation (1), the Head of Department shall forward it to the appropriate Disciplinary Authority having the jurisdiction to impose a punishment of dismissal or reduction in rank together with the officer's records of service and the recommendation of the Head of Department that —

(a) the officer should be dismissed or reduced in rank;

(b) the officer should be punished with any punishment other than dismissal or reduction in rank;

(c) the service of the officer should be terminated in the public interest; or

(d) no punishment should be imposed,

depending on the degree of disrepute which the officer has brought to the public service.

Regulation 33 Consideration of Disciplinary Authority in cases of conviction and detention

(1) If, after considering the report, the records of service and the Head of Department's recommendation forwarded to it under subregulation(sic) 29(2), the appropriate Disciplinary Authority is of the opinion that —

(a) the officer should be dismissed or reduced in rank, the Disciplinary Authority shall impose the punishment of dismissal or reduction in rank, as it deems appropriate;

(b) the offence of which the officer was convicted does not warrant a punishment of dismissal or reduction in rank but warrants the imposition of a lesser punishment, the Disciplinary Authority shall impose upon the

officer any one or more of the punishments other than dismissal or reduction in rank as specified in regulation 38 as it deems appropriate; or

(c) no punishment should be imposed on the officer; the Disciplinary Authority shall acquit him.

(2) If, after considering the report, the records of service and the Head of Department's recommendation forwarded to it under subregulation 32(2), the appropriate Disciplinary Authority is of the opinion that —

(a) the officer should be dismissed or reduced in rank, the Disciplinary Authority shall impose the punishment of dismissal or reduction in rank, as it deems appropriate;

(b) the grounds on which the order was made against the officer do not warrant a punishment of dismissal or reduction in rank but warrant the imposition of a lesser punishment, the Disciplinary Authority shall impose upon the officer any one or more of the punishments other than dismissal or reduction in rank as specified in regulation 38 as it deems fit and proper; or

(c) no punishment should be imposed on the officer, the Disciplinary Authority shall acquit him.

Where a punishment other than dismissal has been imposed on an officer or where the officer has been acquitted by the appropriate Disciplinary Authority, the appropriate Disciplinary Authority shall direct the officer to resume his duties.

[23] The learned High Court judge found that proviso (d) in art 135(2) of the Federal Constitution clearly provides that the opportunity of being heard is neither applicable nor available to a member of the service in a case of restricted residence. Hence, art 135(2)(d) of the Federal Constitution took away the right of a person to be heard in disciplinary proceedings when there is in existence and restriction order or the like against that person. Regulation 33 of the Regulations also provides the Disciplinary Authority is to decide on the appropriate punishment as provided in the same Regulations.

[24] We have carefully reviewed the learned High Court judge's decision and the relevant constitutional and statutory provisions relied by him and we again do not find that he has misdirected himself in any way. It is clear to us that the appellant's right or opportunity to be heard has been specifically ousted by art 135(2)(d) of the Federal Constitution. In the Federal Court case of *Pengerusi Lembaga Tatatertib Polis Diraja Malaysia, Bukit Aman, Kuala Lumpur & 2 Ors v Mohd Azuan bin Aniffa* (Civil Appeal No 01(f)-57–11 of 2015(W)) (unreported), FC which we are bound, Raus Sharif PCA (later CJ) held as follows:

20. It is clear that Article 135(2)(a) and (d) of the Federal Constitutio had taken away the right of a person to be heard in disciplinary proceedings when there is existence of a criminal conviction or any order of detention against that person.

See also *Nordin Hj Zakaria (Timbalan Ketua Polis Kelantan) & Anor v Mohd Noor Abdullah* [2004] MLJU 760; [2004] 2 CLJ 777.

[25] Moreover, it is not in dispute that art 135(2)(d) of the Federal Constitution and reg 32(1) of the Regulations have been invoked by the respondents by virtue of the detention order/restriction order which led to the dismissal decision. We find that the nature of the detention order/restriction order is essentially detention and/or restricted residence that has been imposed on the appellant pursuant to ss 6(1)– 6(3) and 7(1) and (2) of the DD(SPM)A which provide as follows:

> 6 Power to order and restriction of persons
>
> (1) Whenever the Minister, after considering —
>
> (a) the complete report of investigation submitted under subsection (3) of section 3; and
>
> (b) the report of the Inquiry Officer submitted under subsection (4) of section 5,
>
> is satisfied with respect to any person that such person has been or is associated with any activity relating to or involving the trafficking in dangerous drugs, the Minister may, if he is satisfied that it is necessary in the interest of public order that such person be detained, by order (hereinafter referred to as a 'detention order') direct that such person be detained for a period not exceeding two years.
>
> (2) Every person detained in pursuance of a detention order shall be detained in such place (hereinafter referred to as a 'place of detention') as the Minister may direct and in accordance with any instructions issued by the Minister and any regulations made under section 22.
>
> (3) If the Minister is satisfied that for the purpose mentioned in subsection (1) it is necessary that control and supervision should be exercised over any person or that restrictions and conditions should be imposed upon that person in respect of his activities, freedom of movement or places of residence or employment, but for that purpose it is unnecessary to detain him, he may make an order (hereinafter referred to as a 'restriction order') imposing upon that person (hereinafter referred to as a 'restricted person') all or any of the following restrictions and conditions:
>
> (a) that he shall be subject to the supervision of the police for any period not exceeding two years;
>
> (b) that he shall reside within the limits of any State or any Federal Territory or any area thereof specified in the restriction order;
>
> (c) that he shall not transfer his residence to any other area without the written authority of the Chief Police Officer or the State of Federal Territory concerned;
>
> (d) that except in so far as may be otherwise provided by the restriction order, he shall not leave the area within which he resides without the written authority of the Chief Police Officer of the State of Federal Territory concerned;

A (e) that he shall at all times keep the Officer in Charge of the Police District in which he resides notified of the house or place in which he resides;

(f) that he shall at such time or times as may be specified in the restriction order present himself at the nearest police station;

B (g) that he shall remain within doors, or within such area as may be defined in the restriction order, between such hours as may be specified in the restriction order, unless he obtains special permission to the contrary from the Officer in Charge of the Police District;

(h) that except in so far as may be otherwise provided by the restriction order, he C shall not enter any area specified in the restriction order;

(ha) that he shall use only equipment and facilities of communication which are declared to and approved by the Chief Police Officer of the State or Federal Territory of the area in which he is required to reside as may be provided in the restriction order;

D

(hb) that except so far as may be otherwise provided by the restriction order, he shall not access the internet;

(hc) that he shall be attached with an electronic monitoring device;

E (i) that he shall keep the peace and be of good behaviour;

(j) that he shall enter into a bond, with or without sureties as the Minister may direct and in such amount as may be specified in the restriction order, for his due compliance with the restrictions and conditions imposed on him by the restriction order.

F

(3A) A restricted person shall be conveyed by the police to, and shall be in police custody up to, the area specified in the restriction order.

(4) Every restriction order shall continue in force for such period, not exceeding two years, as may be specified therein, and may include a direction by the Minister that G the person in respect of whom it is made shall enter into a bond with or without sureties and in such sum as may be specified for his due compliance with the restrictions and conditions imposed upon him.

(5) A detention order under subsection (1), or a restriction order under subsection (3), may be made against a person notwithstanding that immediately, or at any H time, before his arrest and detention under subsection 3(1) —

(a) he had been detained under a detention order made under section 4, or had been subject to a restriction order made under section 4A, of the Ordinance on grounds which are wholly or partly the same as or similar to the grounds on which the detention order under subsection (1) or the I restriction order under subsection (3) is to be made against him; and

(b) *he had been released from detention either upon the expiry of the duration of the said detention order made under* section 4 *of the Ordinance against him, or otherwise howsoever before such expiry, or had ceased to be subject to the said restriction order made under* section 4A of the Ordinance against him either

upon the expiry of the duration of the said restriction order, or otherwise howsoever before such expiry.

(6) The Minister may, from time to time, by notice in writing served on a person who is the subject of a restriction order, vary, cancel or add to any restrictions or conditions imposed upon that person by that order, and the restrictions or conditions so varied and any additional restrictions or conditions so imposed shall, unless sooner cancelled, continue in force for the unexpired portion of the period specified under subsection (4) or under subsection (1) of section 11A.

(7) Any restricted person who contravenes or fails to comply with any restriction or condition expressed in his restriction order shall be guilty of an offence and shall on conviction be punished with imprisonment for a term not exceeding five years and not less than three years.

7 Suspension of detention orders

(1) The Minister may, at any time, direct that the operation of any detention order be suspended subject to all or any of the restrictions and conditions which he is empowered by subsection 6(3) to impose by a restriction order, and subject, if the Minister so directs, to the requirement that the person against whom the detention order was made shall enter into a bond as provided in subsection 6(4).

(2) Where a detention order is suspended as aforesaid, subsection 6(6) shall have effect as if the restrictions and conditions on which the detention order is suspended were restrictions and conditions imposed by a restriction order.

(3) The Minister may revoke the suspension of any detention order if he is satisfied that the person against whom the detention order was made has failed to observe any restriction or condition imposed upon him or that it is necessary in the interest of public order that the suspension should be revoked, and in any such case the revocation of the suspension shall be sufficient authority to any police officer to re-arrest without warrant the person against whom the detention order was made, and that person shall as soon as practicable be returned to his former place of detention or, if the Minister so directs, sent to another place of detention.

(4) The suspension of any detention order as aforesaid shall, subject to subsection 6(6) as applied by subsection (2) and subject also to subsection (3), continue in force for the unexpired portion of the period of the detention order specified under subsection 6(1) or under subsection 11A (1).

[26] Consequently, we are of the view that art 135(2)(d) of the Federal Constitution is applicable and attracted so long there is a detention and/or restricted residence order in place as per the express wordings of 'preventive detention' or 'restricted residence' seen therein. The order need not mandatorily or even necessarily emanate from a statute relating to security of the Federation. The detention order/restriction order made pursuant to the

DD(SPM)A in preservation of public order suffices.

Denial of plea in mitigation of sentence

[27] Moving on, the appellant contended that the learned High Court judge erred in having failed to consider that justice and procedural fairness dictate that the right to plead in mitigation should be accorded to the appellant when he is summarily dismissed without any show cause letter or notification of intended dismissal. He relied generally on the cases of *State of Uttar Pradesh v Harish Chandra Singh* [1969] 1 SCC 403, *Union of India v Mohd Ramzan Khan* [1991] 1 SCC 588 and *Lembaga Tatatertib Perkhidmatan Awam Hospital Besar Pulau Pinang & Anor v Utra Badi a/l K Perumal* [2001] 2 MLJ 417; [2001] 2 CLJ 525 and specifically *Inspector-General of Police & Anor v Alan Noor bin Kamat* [1988] 1 MLJ 260 where Tun Salleh Abbas LP held as follows:

> Before concluding this judgment, we wish to make here an observation on the following passage of the judgment of the learned judge in the court below:
>
> > The plaintiff sent a reply to the Deputy Inspector-General of Police on 7 June 1980 giving his explanations on the three charges. After considering these explanations and having found that the plaintiff had failed to exculpate himself it was incumbent upon the Inspector-General of Police thereafter to give the plaintiff an opportunity to make a plea in mitigation on punishment. This right of the plaintiff to be heard in mitigation is implied in reg 27 of the General Orders and in art 135(2) of the Federal Constitution for otherwise it cannot be said that the plaintiff had been given a reasonable opportunity of being heard. He had to be heard throughout the proceedings from the beginning to the end. Isn't it a fair and reasonable expectation of any person condemned for a wrong that he would be heard in mitigation before any punishment is imposed on him?
>
> As it stands, this passage appears to be misleading. This passage should be read in the light of the factual situation of this case, wherein the show cause letter dated May 14, 1980 was completely silent as to the contemplated punishment to be imposed at the end of the disciplinary proceedings. Therefore, *in order to ensure that the respondent understood and appreciated the seriousness of the proceedings he was facing, the learned trial judge was right in insisting that another chance must be given to him, which he called a plea of mitigation. If, however, the show cause letter had included the proposed punishment, for example, by the inclusion of such statement as 'This proceeding is taken against you with a view to dismissal or reduction in rank ?' or 'This proceeding is taken under GOD 30 with a view to dismissal or reduction in rank?', or such other phraseology as would give the effect of making the respondent understand the nature of the proceedings and what they would lead to, there is no necessity for the appellants to give another opportunity of being heard before the punishment is imposed*. (Emphasis added.)

[28] The learned High Court judge found that since the appellant has been served with the detention order/restriction order based on regs 32 and 33 of the

Regulations, there is no right or opportunity of mitigation by the appellant because it is the purview of the Disciplinary Authority and the Disciplinary Authority has all necessary documentation including the appellant's service records and recommendations from his head of department to mete the appropriate sentence.

[29] We have accordingly reviewed the learned High Court judge's decision and also find that there is no misdirection here. Based on the case of *Shuib bin Abdul Samad @ Zainal v Tan Sri Dato Seri Khalid bin Abu Bakar & Ors* [2017] 4 MLJ 476; [2017] 10 CLJ 89 of this court, Tengku Maimun Tuan Mat JCA (now CJ) held as follows:

> [23] As for the right to mitigate or to make representation on the punishment, the issue had been settled in *Utra Badi*. In *Utra Badi*, the first appellant, Lembaga Tatatertib Perkhidmatan Awam Hospital Besar Pulau Pinang ('the Disciplinary Board') had terminated the services of the respondent, Utra Badi pursuant to a disciplinary proceeding conducted under GO 26 of the Public Officers ('Conduct and Discipline') ('Chapter D') General Orders 1980 ('the GO 26'). *The respondent contended that his dismissal was unjust and that he should have been given an oral hearing prior to the punishment of dismissal being meted out against him*. He commenced proceedings against the Disciplinary Board in the High Court. The High Court decided in his favour. The matter proceeded to the Court of Appeal where it was decided inter alia that the respondent had been deprived of his right to make representations on punishment. On appeal to the Federal Court, the decisions of both the High Court and the Court of Appeal were set aside. *It was held by the Federal Court that there is no separate right to make representations upon the punishment to be meted out to the officer to be dismissed or reduced in rank*. (Emphasis added.)

[30] In the circumstances, we are satisfied the learned High Court judge is correct that it is the sole purview of the Disciplinary Authority to mete the sentence against the appellant. There will be no judicial intervention unless there is proof tendered by the appellant that the Disciplinary Authority acted capriciously in bad faith.

[31] We are mindful of the case of *Inspector General of Police & Anor v Alan Noor bin Kamat* but the facts therein are starkly distinguishable. It was decided based on Public Service General Orders but not on the Regulations which are not yet in existence then. Furthermore, the charges faced by the relevant officer therein do not seem to relate to detention or restricted residence of that officer involved which attracts proviso (d) of art 135 of the Federal Constitution.

Bereft of police force commission's reasons in decision

[32] The appellant then contended that the learned High Court judge erred in not having appreciated that the second respondent's dismissal decision is

bereft of reasoning and hence not indicative of due application of the mind as required by reg 33(2) of the Regulations. The decision is therefore harsh, unjust and unreasonable. Reliance has been made by the appellant on the case of *Kesatuan Pekerja-Pekerja Bukan Eksekutif Maybank Bhd v Kesatuan Kebangsaan Pekerja-Pekerja Bank & Anor* [2018] 2 MLJ 590; [2017] 4 MLRA 298 and *Raj Kishore Jha v State of Bihar & Anor* [2003]11 SCC 519.

[33] The learned High Court judge in his decision stated that there is nothing in the Regulations that stipulate the obligation on the part of the Disciplinary Authority to give reasons for the dismissal decision. As such there cannot be a breach of duty where none exists at law. It is nonetheless clear the appellant knew of the reason of his dismissal from the second respondent's letter dated 10 February 2020 which stipulates as follows:

> PEMBERITAHUAN HUKUMAN TATATERTIB
>
> Dengan hormatnya saya memaklumkan bahwa Suruhanjaya Pasukan Polis di dalam mesyuaratnya yang ke-105 pada 30 Januari 2020 dengan ini memutuskan Tuan dikenakan hukuman 'buang kerja' mengikut Peraturan 38(g), Peraturan-Peraturan Pegawai Awam (Kelakuan dan Tatatertib) 1993 selepas menimbang dengan teliti perakuan tatatertib di bawah Peraturan 32(2) Peraturan yang sama berkenaan Pengantungan Perintah Tahanan yang dikeluarkan kepada Tuan di bawah seksyen 7(1) Akta Dadah Berbahaya (Langkah-Langkah Pencegahan Khas) 1985.

[34] We have again reviewed the learned High Court judge's decision and find there is no misdirection here too. We find that the appellant is aware that he has been dismissed because of the detention order/restriction order made pursuant to s 7(1) of the DD(SPM)A and that is adequate. In any event, we find that the appellant does not need the detail reasons of the dismissal decision by reason that judicial review is concerned with the decision-making process and not the merits of the decision.

Service suspension order unlawful

[35] The appellant also went on to contend that the learned High Court judge erred in failing to appreciate that the service suspension order made by the Inspector General of Police dated 25 April 2017 is unlawful because it was the Inspector General of Police who suspended the appellant with effect from 28 March 2017. The suspension has to be instead ordered by the Disciplinary Authority pursuant to reg 45(1) of the Regulations which provides as follows:

> Reg 45 Suspension
>
> (1) The appropriate Disciplinary Authority having the jurisdiction to impose a punishment of dismissal or reduction in rank may suspend an officer from the exercise of his duties if —
>
> (a) the officer has been convicted by any criminal court; or

(b) an order as specified in regulation 32 has been made against the officer.

(2) The period of suspension under this regulation shall commence from the date of conviction or the effective date of the order, as the case may be.

(3) An officer who is suspended from the exercise of his duties —

(a) shall not be allowed to receive any part of his emoluments which has not been paid during the period of his interdiction under regulation 44; and

(b) shall not be entitled to receive any emolument throughout the period of his suspension.

(4) The decision by the appropriate Disciplinary Authority to suspend an officer shall be notified to him in writing.

[36] In addition, the appellant contended that the service suspension order is ultra vires. Furthermore, it contravenes art 149 of the Federal Constitution. Hence the dismissal decision is a nullity.

[37] In this regard, the learned High Court judge held that there is no merit in the appellant's contentions because the appellant had already instituted prior judicial review proceedings on the detention order which had failed. Hence and with the clear provisions in regs 32 and 33 of the Regulations, the learned judge found it baffling how it can be contended that the disciplinary action of the second respondent is unlawful. He nevertheless also found that the service suspension order is lawfully made pursuant to the delegated power given by the second respondent.

[38] We have reviewed the learned High Court judge's decision accordingly but do not find any misdirection too. On the factual history and circumstances, we find that any attempted challenge by the appellant on the lawfulness of the detention order/restriction order that is inextricably connected with the dismissal decision must be barred by res judicata and/or issue estoppel; see *Asia Commercial Finance (M) Sdn Bhd v Kawal Teliti Sdn Bhd* [1995] 3 MLJ 189 and *Badiaddin bin Mohd Mahidin & Anor v Arab Malaysian Finance Bhd* [1998] 1 MLJ 393. The appellant's complaint has to be pursued by way of appeal against the previous unsuccessful judicial review decision but not as a collateral attack in a subsequent dismissal action brought via a new judicial review application. This is clear from the Federal Court case of *Selvaraju Ponniah v Suruhanjaya Perkhidmatan Awam Malaysia & Anor* [2007] 7 MLJ 1; [2007] 6 CLJ 245 wherein Nik Hashim FCJ held as follows:

> [12] Therefore, by its provision, art 135(2)(d) clearly takes away the right of the appellant to be heard in the disciplinary proceedings taken against him solely on the existence of the detention order. Whereas General Orders 34 and 35 provide that

A the disciplinary authority of such proceedings is to decide on the appropriate punishment as provided for under General Order 36(i) of the GO 1980 upon the factual existence of the detention order. *Thus, the legal power of the disciplinary authority allowed it to make a valid order to dismiss the appellant from the service notwithstanding that the validity of the detention order was in question*.

B [13] *It must also be pointed out that the appellant was making a collateral challenge by filing the writ and statement of claim to declare that his dismissal was null and void because the detention order used against him was not valid. We are of the view that the appellant could not challenge the validity of the detention order through the dismissal action that he brought*. (Emphasis added.)

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[39] We are aware that the appellant raised a new point of law here that the service suspension order made by the Inspector General of Police is also ultra vires art 149(1) of the Federal Constitution which provides as follows:

D Art 149 Legislation against subversion, action prejudicial to public order, etc.

(1) If an Act of Parliament recites that action has been taken or threatened by any substantial body of persons, whether inside or outside the Federation —

E (a) to cause, or to cause a substantial number of citizens to fear, organized violence against persons or property; or

(b) to excite disaffection against the Yang di-Pertuan Agong or any Government in the Federation; or

F (c) to promote feelings of ill-will and hostility between different races or other classes of the population likely to cause violence; or

(d) to procure the alteration, otherwise than by lawful means, of anything by law established; or

G (e) which is prejudicial to the maintenance or the functioning of any supply or service to the public or any class of the public in the Federation or any part thereof; or

(f) which is prejudicial to public order in, or the security of, the Federation or any part thereof,

H any provision of that law designed to stop or prevent that action is valid notwithstanding that it is inconsistent with any of the provisions of Article 5, 9, 10 or 13, or would apart from this Article be outside the legislative power of Parliament; and Article 79 shall not apply to a Bill for such an Act or any amendment to such a Bill.

I (2) A law containing such a recital as is mentioned in Clause (1) shall, if not sooner repealed, cease to have effect if resolutions are passed by both Houses of Parliament annulling such law, but without prejudice to anything previously done by virtue thereof or to the power of Parliament to make a new law under this Article.

[40] According to the appellant, the dismissal decision is consequently ex facie a nullity by virtue of a violation of art 149(1) of the Federal Constitution that resulted in the second respondent making a tainted decision. Thus, this reviewing court has the jurisdiction and power to intercede to afford protection to the fundamental rights of citizens.

[41] Upon careful consideration, we do not find that the service suspension order made by the Inspector General of Police has any material bearing on the crucial detention order/restriction order, directly or otherwise, and the resultant dismissal decision ultimately. The appellant's contention here is in our view a 'red herring'. In any event, we do not find that there is a violation of art 149(1) of the Federal Constitution by the respondents in any way contrary to that as asserted by the appellant. Be that as it may, we further find that the service suspension order has also been properly made by the Inspector General of Police pursuant to a delegated power of the second respondent which is not prohibited in the Regulations.

Detention order lapsed

[42] Finally, the appellant contended that the learned High Court judge erred in failing to find that the dismissal decision is bad because it has been made after the detention order has lapsed.

[43] The learned High Court judge in his decision held that this was not a question raised by the appellant in his judicial review application. That notwithstanding, the learned judge found that the appellant's disciplinary proceedings clearly commenced during the detention period and the second respondent made the dismissal decision based on the letter of the appellant's head of department dated 26 March 2019 which was issued before the period of detention expired on 28 March 2019. Moreover art 135(2) of the Federal Constitution does not also stipulate that the detention order must still be subsisting at the time of the dismissal of the officer. In fact, the express words are 'where there has been made against a member of such service any order of detention'. It is therefore immaterial if the dismissal decision has been made after the detention order has lapsed or expired.

[44] We concur with the learned High Court judge's decision and do not find any misdirection whatsoever here as well.

CONCLUSION

[45] Consequently, we are satisfied that the appellant has not made out a meritorious appeal before us that warrants appellate intervention. There is no

A irrationality, illegality or procedural impropriety demonstrated in the decision-making process of the disciplinary action which led to the appellant's dismissal following the case of *Kerajaan Malaysia & Ors v Tay Chai Huat*.

B **[46]** For the foregoing reasons, the appeal is dismissed as so ordered.

Appeal dismissed.

Reported by Ashok Kumar

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